Benefit-sharing in marine areas beyond national jurisdiction

Benefit-sharing in marine areas beyond national jurisdiction: where are we at? (Part II)

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– Photo by Emrys Roberts

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July 2014: Negotiations in New York continued in June 2014 on the need for a new international agreement to ensure benefit-sharing from the use of marine genetic resources in the deep seas.

The General Assembly's Working Group on marine biodiversity in areas beyond national jurisdiction reconvened from 16-19 June 2014 to continue an exchange of substantive views on the scope, parameters and feasibility of a new international instrument to be adopted under the UN Convention on the Law of the Sea (UNCLOS). This blogpost will provide a brief analysis of whether the June meeting has advanced understanding and identified any common ground with regard to the aims and possible sources of inspiration for the creation of a global benefit-sharing mechanism under UNCLOS.

Aims

To some extent, the June meeting served to focus on the expected aims of a new global benefit-sharing mechanism related to marine genetic resources in areas beyond national jurisdiction (MGRs). Guatemala, for instance, indicated that a new instrument should prevent abuses in the commercialization of MGRs by monitoring MGR use and creating a database to support the examination of patent applications. Cuba also underscored the need for documenting the origin of MGRs. Mexico made more general reference to the need to ensure that MGRs are used for the benefit of humankind, while creating positive externalities in terms of scientific and technological cooperation. Several developing countries emphasized that benefit-sharing can play a key role in the implementation of the existing

obligations under UNCLOS related to capacity building and the transfer of marine technology, which are famously lagging behind in terms of operationalization. The EU also stressed that a new agreement is needed to ensure that MGRs are collected in a manner consistent with their conservation and sustainable use.

While the group of developing countries (G-77/China) continues to argue that the principle of common heritage of mankind should be extended to MGRs, subtle differences have appeared within the group as to whether to expand the mandate of the International Seabed Authority (ISA), which is mandated to share the benefits arising from the exploitation of minerals in the deep seabed and its subsoil beyond areas of national jurisdiction (the Area), to oversee implementation of the obligations under a new agreement. This proposal has raised skepticism, however, as there is little, if any, similarity in the regulation of minerals and MGRs: bio-prospecting does not need licensing or lengthy access to resources as deep-sea mining does. And this is not to mention the fact that the ISA has not yet accrued any experience of benefit-sharing nor developed benefit-sharing regulations, since the exploitation of minerals in the deep seabed is only about to start. So, some developing countries have expressed their openness to consider an international mechanism “similar to that for the Area,” which may open the door for what many call a “pragmatic” approach to filling the legal gap on MGRs and benefit-sharing. Thailand, for instance, proposed investigating the possibility of an international public trusteeship model. New Zealand emphasized that there is currently no “perfect model” for sharing the benefits of MGRs and that a *sui generis* approach should be considered.

In addition, views continue to diverge as to whether a new global benefit-sharing mechanism should also provide for the sharing of benefits from non-commercial research, or only from commercial research (or “research and development”/R&D). In that connection, Argentina reminded delegates that in the context of MGRs in areas beyond national jurisdiction, usually private companies engaged in R&D obtain access to samples free of charge, because bio-prospecting is usually conducted by publicly-funded researchers. It also remains unclear whether a global benefit-sharing mechanism would regulate access to MGRs. The EU proposed to subject access to MGRs to notification or authorization, based on flag state jurisdiction or related to an international mechanism to be established by a new agreement, but other States intervening in the June meeting focused exclusively on benefit-sharing.

Sources of inspiration

While the regime for the Area may not be suitable to provide a model to inspire the creation of a new benefit-sharing mechanism for MGRs, two other international agreements were often referred to in the June meeting. One is the Nagoya Protocol on Access to Genetic Resources and Benefit-sharing under the Convention on Biological Diversity, and the other is the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR). At the June meeting, states elaborated more than in the past on the extent to which these two agreements can help inform future negotiations on MGRs.

Nagoya Protocol

As to the Nagoya Protocol, the EU has argued that a new instrument under UNCLOS could "borrow" the definition of "utilization of genetic resources" from the Protocol. As UNCLOS does not make any reference to "genetic resources", this may appear in effect a useful starting point. That said, the definition of the Nagoya Protocol raises complex issues. First of all, it is generally understood that it comprises not only genetic resources, but also the so-called "derivatives" (that is, material that does not contain DNA, such as the secretions of certain organisms). This inclusion is significant in broadening the range of natural materials from the use of which benefit-sharing obligations would arise. But the concept of derivatives is included in the definition of "utilization of genetic resources" under the Nagoya Protocol through an indirect cross-reference which is not self-explanatory, to say the least. A clearer definition could certainly be elaborated in future negotiations. In addition, the emphasis on "utilization" rather than on "access" to genetic resources under the Nagoya Protocol has raised some concerns, particularly in light of EU legislation implementing the Protocol, that it may lead to divergent interpretations regarding the temporal scope of benefit-sharing obligations. It has in fact been argued that a restrictive interpretation would lead to a very significant reduction of the range of activities giving rise to the benefit-sharing obligation.

Several States have also noted that the Annex to the Nagoya Protocol can provide a useful template to articulate monetary and non-monetary benefits to be shared from the utilization of MGRs. Several States have in effect noted that non-monetary benefits may be more immediately identifiable and available,given the usually lengthy research and development process and uncertainty related to ultimate commercialization. Non-monetary benefits can also contribute to gradually building the capacity of developing countries to utilize their genetic resources and be targeted to support long-term cooperative relations among States through the sharing of research and development results, collaboration in scientific research and development, participation in product development, and admittance to ex situ facilities and databases, as well as capacity-building and training. To some extent, monetary benefits may also contribute to establish long-term relations, including on the basis of intellectual property rights (IPRs). But there is much more resistance to the use of IPRs as a basis of monetary benefit-sharing, as developed countries prefer to leave all IPR-related questions to other fora, notably the World Intellectual Property Organization. In all events, it can be asserted that the list of monetary and non-monetary benefits under the Nagoya Protocol provides a wide range of options for States, as well as calling attention to the possibility of devising benefits that may support local livelihoods or be channelled back into conservation efforts.

The third reference made to the Nagoya Protocol during the June meeting concerned the Protocol provision on a global multilateral benefit-sharing mechanism (Article 10). This is, however, a puzzling reference as the Protocol only requires parties to explore the need for the establishment of such a mechanism, rather than providing an express (let alone time-bound) commitment to its creation. In addition, the provision does not give any indication as to the possible modalities of such a mechanism, which are also to be the subject of discussion. In actual fact, this provision of the Nagoya Protocol has raised more questions than it has answered. It is mostly a reminder of the many complexities of ensuring benefit-sharing in situations where a bilateral approach based on prior informed consent may not fit reality.

More generally, the US noted that the general approach underlying the Nagoya Protocol, which is based on *bilateral negotiations* between the State providing genetic resources and the State hosting users of genetic resources, is only suited to genetic resources under national jurisdiction.

ITPGR

The EU and other countries have also generally noted that the ITPGR may provide a useful source of inspiration as the only functioning multilateral benefit-sharing mechanism. No country, however, has yet elaborated on the extent to which it would be possible to build on such a template in the context of MGRs. And the US has emphasized that the "standardized approach" under the ITPGR is only made possible by being narrowly tailored to a specific sub-sector of genetic resources, namely a specified list of plant genetic resources for food and agriculture.

In effect, there are at least three other characteristics that should be taken into account for present purposes. First of all, the ITPGR Multilateral System is a comprehensive system for ABS, of which the Benefit-sharing Fund is only a part, and addresses one specific sector only of genetic resources. Second, the Multilateral System in effect built upon a pre-existing network of research centers under the Consultative Group on International Agricultural Research (CGIAR), whereas a global benefit-sharing mechanism under UNCLOS would start from scratch. Third, benefits under the ITPGR Multilateral System are directed to farmers in all countries, albeit especially in developing countries and countries with economies in transition, but it would be very difficult to identify which groups within developing countries should share in the benefits from the use of MGRs. In addition, despite the fact that the ITPGR has been in force and operational for ten years, monetary benefits have yet to materialize.

What next?

The next meeting of the Working Group will convene from 20-23 January 2015. Delegates will likely focus on procedural issues, namely drafting a recommendation to the General Assembly as to whether to launch formal intergovernmental negotiations on a new international instrument on marine biodiversity in areas beyond national jurisdiction. The General Assembly was called upon by the 2012 UN Conference on Sustainable Development to make such a decision by the end of 2015.

It seems that more and more countries (including among those that remain to be convinced of the need for a new treaty, such as Norway and Iceland) agree that there is a legal gap with regard to MGRs and benefit-sharing. Only the US has openly opposed the creation of a benefit-sharing mechanism at the international level. While this remains the main priority of developing countries in this process, other substantive questions will also weigh in the decision to launch negotiations or not: this is notably the issue of whether a new implementing agreement should also add to existing global regulation of fisheries, which some countries have explicitly considered the main reason not to launch negotiations. While a consensus decision on the launch of formal negotiations remains a difficult objective to achieve in January 2015, it has become clear to almost all that the launch of formal

negotiations is a long-awaited procedural step that is urgently needed for the international community to start the construction of a new global benefit-sharing mechanism.

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